Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

No. 80-50

In the Supreme Court of the United States
OCTOBER TERM, 1980

SAM MILLER McDONALD, PETITIONER

v.

THE STATE OF TEXAS, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE TEXAS COURT OF
CRIMINAL APPEALS

PETITIONER'S REPLY AND ANSWER TO RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

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SAM MILLER McDONALD,
Petitioner

V.

THE STATE OF TEXAS,
Respondent

On Petition For Writ Of Certiorari
To The Texas Court Of
Criminal Appeals

PETITIONER'S REPLY AND ANSWER TO RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

COMES NOW, Sam Miller McDonald, Petitioner herein, by and through his attorney, Stephen F. Hefner, and in reply and answer to Respondent's Brief in Opposition submits the following.

I.

SUMMARY OF ARGUMENT

There are special and important reasons to consider the issues presented.

The fact that Petitioner has applied for a Writ of Habeas Corpus should have no effect upon this Court's decision with regard to whether or not to grant Petitioner's Application for Writ of Certiorari.

Petitioner has presented the issue raised in his Petition to the Texas Court of Criminal Appeals, and, therefore, this Court has jurisdiction to grant the Writ of Certiorari requested.

The post-trial hearing of which the Petitioner complains did deny him due process of law and his right to a fair trial, and he was harmed by the hearing.

II.

ARGUMENT

A.

The Question Presented for Review is Worthy of This Court's Consideration

First, Petitioner would comment that the

correct rule that Respondent wishes to refer to is Rule 19 of the Rules of the Supreme Court, not Rule 17.

In his Petition, Petitioner discusses in detail the numerous reasons why his petition is worthy of the court's consideration. The two central reasons are listed as follows:

1. Petitioner was denied due process of law in the trial court's allowance of an unauthorized separation of the jury.

2. Petitioner was denied due process of law in the subsequent holding of a post-trial hearing by the court which was calculated to destroy Petitioner's ability to demonstrate the harm incurred by such jury separation.

It is uncontroverted that under the Code of Criminal Procedure of the State of Texas, and the decisions of the Court of Criminal Appeals of Texas, that where a separation of the jury occurs after the charge is given at the guilt-stage of the trial, a presumption of harm to the Defendant attaches, placing the burden on the prosecution

show that no injury resulted or could not have reasonably resulted from such separation. Skillern v. State, 559 S.W.2d 828, 830-32 (Tex.Crim. App. 1977); Goodall v. State, 501 S.W.2d 342, 343 (Tex.Crim.App. 1973). Further, it is uncontroverted that there is no special procedure under the Texas Code of Criminal Procedure by which the state may attempt to demonstrate that Defendant was not harmed by the separation of the jury.

What happened in this case was in complete contravention to the above two mentioned propositions. Of what use is a presumption of law if it has no force and effect? Further, how can a procedure, which is not given in the statutes or any court decision, simply be created out of thin air? The correct procedure that should have been followed in this case is discussed in detail in the Petition, at 13. Suffice it here to say that the correct procedure was not followed in the trial of this case.

B.

This Court is Under No Constraint Whatsoever to Refrain from Action on the Petition for Writ of

Certiorari in Order to Allow Petitioner's Application for Writ of Habeas Corpus in the United States District Court to Procede in an Orderly Manner

Petitioner vehemently objects to Respondent's wholly unsubstantiated contention that this court should refrain from acting on Petitioner's petition for Writ of Certiorari in order to allow Petitioner's Application For Writ of Habeas Corpus in the United States District Court to proceed in an orderly manner. Respondent is seeking, in an unfair way, to block all possible remedies open to Petitioner. First, Petitioner points out that in his Motion to Dismiss Petitioner's Writ of Habeas Corpus, a copy of which is incorporated herein as Appendix "A," Respondent states, as one ground for dismissal, that the court should not consider the Writ of Habeas Corpus until the Supreme Court of the United States has made a decision upon Petitioner's Writ of Certiorari. Respondent's Motion to Dismiss, Section VI. If the Court follows Respondent's suggestion, then this case could be left in a curious position. If the lower court delays

in granting Petitioner's Writ of Habeas Corpus until the Supreme Court of the United States makes a decision with respect to Petitioner's Writ of Certiorari, and if the Supreme Court of the United States decides to delay in making a decision with respect to Petitioner's Writ of Certiorari until Petitioner's Writ of Habeas Corpus has been disposed of, then this leaves Petitioner with no remedy whatsoever in any form. Respondent is clearly seeking inconsistent remedies in different forums, doing anything it can to block all avenues of relief open to Petitioner, while failing to give all forums the benefits of any precedents therefor. This is blatantly unfair to Petitioner, and would, in itself, amount to a denial of due process to the Petitioner, and Petitoner would again vehemently object to such tactics on the part of Respondent. Further, the proposition that this Court should refrain from acting on a Writ of Certiorari until a decision has been made with respect to a Writ of Habeas Corpus is a manufactured proposition of law by Respondent, having no support whatsoever in any case law in existence, and Respon-

dent cites to no case to support its contention. Further, for Respondent's elucidation, there is no Writ of Habeas Corpus on file with this Court, and, therefore, the provisions of 28 U.S.C. §2241 would not appear to be applicable to this proceeding.

The status of the law several years ago could be summarized by stating that before a Petition for Writ of Habeas Corpus could be considered by a Federal District Court, there had to be on file a petition for Writ of Certiorari to the United States Supreme Court. A good example is the case of Curtis v. Boeger, 331 F.2d 675 (8th Cir. 1964). In Curtis, appellants had filed petitions for writs of habeas corpus in federal district court. The petitions were denied on the grounds that appellants had failed to exhaust state remedies. The Eighth Circuit stated the issue as being "whether it was necessary for appellants to apply to the Supreme Court of the United States for Writ of Certiorari from the order of the Supreme Court of Missouri denying them relief, before they were entitled to a hearing in the United States

District Court upon the merits of their claims." Id., at 675-76. The Eighth Circuit addressed the issue as follows:

> "In his brief, appellee acknowledges that 'Fay v. Noia expressly obliterated the past procedural requirement of certiorari to the United States Supreme Court before consideration of habeas relief in the District Court' and suggests that this Court 'remand these cases to the District Court for further proceedings in consonance with the requirements of Townsend v. Sain, 372 U.S. 293 [83 S.Ct. 745, 9 L.Ed.2d 770].'
>
> Being now fully advised and informed in the premises, the Court determines that appellants were not, as a prerequisite to a hearing upon the merits of their application, required to petition the Supreme Court of the United States for writ of certiorari and further determines that they have exhausted their state remedies within the teachings of

Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837." Id., at 676. (Emphasis supplied).

Thus, due to the holding of the court in Fay v. Noia, 372 U.S. 391, there is no longer in existence the procedural requirement that there must be on file a petition for Writ of Certiorari to the Supreme Court before a Petition for Writ of Habeas Corpus can be considered. It, therefore, follows that a petition for habeas corpus should not be a bar to the consideration by this Court of an Application for Writ of Certiorari.

C.

Petitioner's Claim Was Presented to the Texas Court of Criminal Appeals

Respondent's contention that Petitioner did not present the question of whether he was denied a fair trial and due process of law to the Texas Court of Criminal Appeals is blatantly wrong. In Respondent's Brief, at 5, Respondent states as follows:

"Petitioner complained that the post-trial hearing constituted reversible

error, but did not allege that this procedure deprived him of a fair trial or denied him due process of law." Id.

First, the third ground of error advanced by Petitioner to the Texas Court of Criminal Appeals is stated as follows:

> "The trial court committed reversible error in permitting the jury to separate during the trial and before a verdict was reached, without the consent of the appellant, in violation of appellant's constitutional and statutory rights under the 6th and 14th amendments to the Constitution of the United States and Vernon's Ann. C.C.P. Article 35.23 (R. 138, 139)." Petitioner's Petition for Writ of Certiorari, Appendix E. (Emphasis supplied).

Second, Petitioner refers the Court to Appendix C of his Petition, containing excerpts from the official court reporter's transcription of trial. On page 15 of Appendix C, Petitioner's counsel stated that the hearing held by the Court

"is injurious and harmful to Defendant, Sam McDonald, and would be calculated to deprive him of a fair and impartial trial as guaranteed under the constitution and laws of the United States." Id. On Page 16 of Appendix C, Petitioner's counsel stated that the hearing held by the Court "is in violation of the Code of Criminal Procedure of the State of Texas and in violation of the Constitution of the United States of America, and particularly the Fourteenth Amendment thereof, which guarantees a man a fair and impartial trial . . . ." Id. Petitioner's counsel could not have been plainer in his language as to what he was objecting to. For Respondent to assert otherwise is simply an attempt on its part to cloud the true issues before this Court.

Third, Petitioner requests that the Court read the case of McDonald v. State, 597 S.W.2d 375 (C.C.A. 1980), a copy of which is provided as Appendix A of the Petition. Petitioner believes that once the Court has made a review of this case that it will agree that the Texas Court of Criminal Appeals thoroughly explored the questions of

whether Petitioner was denied his rights to a fair trial and due process of law.

Last, in Section IV of his argument, Respondent admits that the issue of whether Petitioner was denied his right to a fair trial and due process of law by the procedure employed by the trial court was fully discussed by the Texas Court of Criminal Appeals. Respondent states as follows:

> "Petitioner's contention that he was denied a fair trial and due process of law by the trial court's conduct of the post-trial hearing fails to raise a constitutional claim worthy of this Court's consideration. The opinion of the Texas Court of Criminal Appeals, which is reproduced as Appendix A of the Petition, fully discussed this contention and found it to be without merit." Respondent's Brief, at 6. (Emphasis supplied).

Therefore, Respondent's contention that Petitioner did not present the question of whether he was denied a fair trial and due process of law to

the Texas Court of Criminal Appeals is without merit, and should be given no consideration by the Court.

D.

Petitioner Was Denied His Right to a Fair Trial and Due Process of Law by the Post-Trial Hearing

The only answer given by Respondent to Petitioner's objection to the hearing is that "there is no specific statutory procedure for the State to meet its burden of showing that Petitioner was not harmed by the separation of the jury . . . ." Respondents Brief, at 6. While there is no special procedure under the Texas Criminal Procedure by which the state may attempt to demonstrate lack of harm in the separation of the jury, there is a procedure available through which the State may show lack of harm. Under the Texas Code of Criminal Procedure, "should a defendant's motion for new trial be overruled and a judgment of conviction delivered, the state's evidence regarding harm through separation of the jury would be heard upon the defendant's motion for new trial." Petition, at 13, citing Art. 40.03, Tex. Code Crim.

Proc. Ann. (1979). Thus, the State did have a procedure available through which it could show lack of harm. it simply shose to ignore it.

There are good reasons why rules of procedure exist. First, they place Defendants on fair notice as to how their trials are going to be handled. Second, they serve the higher purpose of protecting a defendant's due process rights. All defendant's have a right to rely on the rules of procedure to give them whatever protection the rules afford. The fact that there is no "special procedure" available, whereby the State could show that there was no harmful error in the court's allowing the separation of the jury, is the State's problem, to be remedied by the Texas Legislature. It should not be the problem of the Petitioner, although the Respondent in its Brief has chosen to make it so.

With respect to the contention that Defendant somehow waived his objections to the fact that the trial judge warned the first three jurors prior to questioning them that they could be held in contempt of court if their testimony revealed any im-

proper discussion of the case, Petitioner states that such an objection would be both superfluous and unnecessary. Petitioner had already entered an objection to the holding of the hearing. See: Appendix C, at 2. The case of Wainwright v. Sykes, 433 U.S. 72 (1977), cited by Respondent is inapplicable because it is a habeas corpus case, and in such cases, federal review of state procedures is limited.

With the respect to the contention by Respondent that "matters of state procedure are not reviewable in a federal form absent a denial of fundamental fairness . . . ," Respondent's Brief, at 6, Petitioner would comment that evidently Respondent is becoming confused between the Writ of Habeas Corpus and the petition for Writ of Certiorari. All of these cases cited to by the Respondent in are habeas corpus cases in which the federal court refused to grant the writ of habeas corpus because of the sancity of state procedures. State procedures, however, are reviewable by the Supreme Court of the United States when a case comes to it on a Writ of Certiorari. Rule 19 of the rules of

the Supreme Court states in pertinent part as follows:

> "Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court." Id.

Petitioner would respectfully submit that it is evident from a review of this case that Respondent was denied his right to a fair trial and due process of law. State procedures with respect to separation of a jury and the presumptions of harm were ignored by both the trial court and the Court of Criminal Appeals. For the State to blatantly disregard the procedures available, and for the State to manufacture a procedure which violates the Sixth Amendment to the United States Constitution, is a violation of due process of law, because it does not give a defendant fair notice.

E.

CONCLUSION

For all of the reasons stated above, Petition-

er prays that his Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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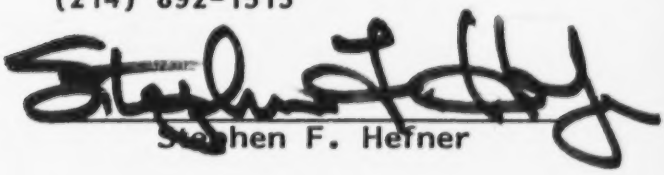
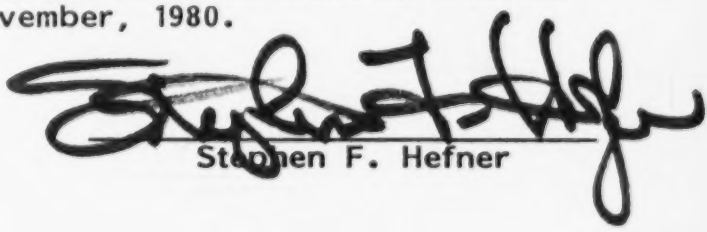


Stephen F. Hefner

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and correct copy of the above and foregoing Reply of Petitioner was this date mailed by me to Mr. Charles A. Palmer, Assistant Attorney General of the State of Texas, P. O. Box 12548, Capitol Station, Austin, Texas 78711, Attorney for Respondent, with proper postage affixed and depositing same in the United States mails on this the 17th day of November, 1980.



Stephen F. Hefner

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

PARIS DIVISION

SAM McDonald,	§
Petitioner	§
	§
V.	§
CIVIL ACTION NO. P-80-18-CA	§
W. J. ESTELLE, JR.,	§
DIRECTOR, TEXAS DEPARTMENT	§
OF CORRECTIONS,	§

RESPONDENT'S MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES W. J. Estelle, Jr., Director, Texas Department of Corrections, Respondent herein, by and through his attorney, the Attorney General of Texas, and in response to Petitioner's application for writ of habeas corpus files this his Motion to Dismiss, and in support thereof would show the Court the following:

I.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 2241, 2254.

II.

Respondent denies every allegation of fact

made by Petitioner except those supported by the record and those specifically admitted hereinafter.

III.

Respondent has lawful custody of Petitioner pursuant to a judgment and sentence of the 6th District Court of Fannin County, Texas in Cause No. 15862, styled The State of Texas v. Sam McDonald. Petitioner was indicted for the offense of murder, to which he entered a plea of not guilty. He was tried by a jury which on April 20, 1977, found him guilty of the offense of voluntary manslaughter and subsequently assessed punishment at imprisonment for 15 years. Petitioner's conviction was affirmed by the Texas Court of Criminal Appeals on March 19, 1980. McDonald v. State, _____S.W.2d_____(No. 58,823). Petitioner has not filed any applications for state writ of habeas corpus. Copies of the records of Petitioner's trial and appeal are available and will be forwarded to the Court if Respondent is required to file an answer.

IV.

Respondent submits that Petitioner's application should be dismissed for failure to exhaust state remedies as required by 28 U.S.C. § 2254(b), (c).

V.

Respondent construes Petitioner's allegations to be as follow:

(1) Because Petitioner's hearing is impaired, conduct of the trial without special provision for amplification of the witnesses' and parties' voices:

(a) Deprived Petitioner of due process of law;

(b) Denied Petitioner the right to confront the witnesses against him;

(c) Denied Petitioner the right to a fair and impartial trial;

(d) Prevented Petitioner from receiving effective assistance of counsel;

(2) The court's charge denied Petitioner due process and equal protection of the law and the right to a fair trial;

(3) The laws of the State of Texas with regard

to defense of a habitation are unconstitutional; and

(4) The trial court's conduct of a post-trial hearing in order to ascertain whether Petitioner was harmed by the separation of the jury without his consent denied him due process of law and the right to a fair trial.

VI.

Petitioner's application for writ of habeas corpus was filed in this Court on May 21, 1980. On June 19, 1980, Petitioner filed a petition for writ of certiorari in the United States Supreme Court, raising one of the grounds contained in the instant application. Respondent submits that Petitioner should not be allowed to pursue his claims in two different federal forums simultaneously. Accordingly, the application for writ of habeas corpus should be dismissed pending disposition fo the petition for writ of certiorari.

VII.

Respondent further submits that the application must be dismissed for failure to exhaust state remedies. Attached to this motion as Re-

spondent's Exhibit A are copies of two pages from Petitioner's appellate brief which list the grounds of error asserted therein. The claims advanced in the instant application relating to Petitioner's impaired hearing and the unconstitutionality of certain Texas laws were not among those presented to the Texas Court of Criminal Appeals for that Court's consideration. Consequently, the application must be dismissed for failure to exhaust state remedies. 28 U.S.C. § 2254(b), (c); Fay v. Noia, 372 U.S. 391, 420, 83 S.Ct. 822, 839, (1963); Picard v. Connor, 404 U.S. 270, 276, 92 S.Ct. 509 (1971); Galtieri v. Wainwright; 582 F.2d 348 (5th Cir. 1978) (en banc).

WHEREFORE, PREMISES CONSIDERED, Respondent respectfully requests that Petitioner's application for writ of habeas corpus be dismissed pending disposition of his petition for writ of certiorari filed in the United States Supreme Court. In the alternative, Respondent respectfully requests that the application be dismissed for failure to exhaust state remedies.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

RICHARD E. GRAY, III
Executive Assistant Attorney General

W. BARTON BOLING
Assistant Attorney General
Chief, Enforcement Division

/s/ Charles A. Palmer
CHARLES A. PALMER
Assistant Attorney General

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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I, Charles A. Palmer, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing Respondent's Motion to Dismiss has been served by placing same in the United States mail, postage prepaid, certified, return receipt requested, on this the 8th day of October, 1980, addressed to:

Stephen F. Hefner
Attorney for Petitioner
109 West Houston Street
Sherman, Texas 75090

/s/ Charles A. Palmer
CHARLES A. PALMER
Assistant Attorney General